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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1301

EARL JEROME GOREL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Earl Jerome Gorel, respectfully prays that this Court issue a writ of certiorari to review and reverse the judgement of the United States Court of Appeals for the Fifth Circuit entered in cause number 78-5592 on September 17, 1979, affirming the judgement of the United States District Court for the Southern District of Texas at Houston, (Hereafter District Court).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not been officially reported. The United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction of conspiracy to kidnap on September 17, 1979. He was convicted in the United States District

Court for the Southern District of Texas at Houston. The United States Court of Appeals for the Fifth Circuit denied petition for rehearing on January 11, 1980. The opinions of September 17, 1979 and January 11, 1980 are attached hereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1) and Rule 19 (1) (b.) of the Rules of this Court, to appeal a decision of the United States Court of Appeals for the Fifth Circuit (hereafter Fifth Circuit), which has decided a federal question in conflict with an applicable statute and with applicable decisions of this Court; or which has decided an important question of federal law which has not been, but should be, settled by this Court; and which has rendered a decision in conflict with the decision of another Court of Appeals and with decisions of the same Court of Appeals on the same matter, and to call for the exercise of this Court's supervisory powers over inferior Federal Courts.

This petition is timely in that it is filed within thirty (30) days of the denial for rehearing.

QUESTIONS PRESENTED FOR REVIEW

Petitioner presents the following questions for review by this Court:

1. Whether the Fifth Circuit erred in holding that the arrest warrant for Petitioner was issued upon probable cause because the issuing magistrate's failure to disqualify himself prior to his probable cause determination violates Petitioner's constitutional rights under the Fourth Amendment to the United States Constitution and rights under 28USC§455 (a).

2. Whether the Fifth Circuit erred in holding that the arrest warrant for Petitioner was validly issued because the magistrate's own actions show that he was not a "neutral and detached" magistrate.

3. Whether the Fifth Circuit erred in holding that the arrest warrant was issued upon probable cause because the magistrate's delay of self disqualification until immediately after the probable cause determination violates Petitioner's guarantee of due process of law under the Federal Constitution.

4. Whether the Fifth Circuit erred in holding that the arrest warrant issued upon probable cause.

5. Whether the Fifth Circuit erred in its holding that the information in the affidavit for the arrest of Petitioner was reliable because the informant was a confessed participant in the conspiracy as per *United States* v. *Harris,* 403 U.S. 573 (1971).

6. Whether the Fifth Circuit erred in its finding that the magistrate disqualified himself "because he was related to Gorel's wife", when the magistrate's own testimony fails to identify that specific reason and permits wide-range speculation as to the reasons for self-disqualification.

7. Whether the Fifth Circuit erred in its factual determination that Petitioner was taken before a magistrate on the evening of his arrest when the record shows conclusively the contrary,i.e. that he was not taken before a magistrate at that time nor until the late morning of the day following his arrest.

8. Whether the Fifth Circuit erred in its factual determination and implied finding that the magistrate disqualified himself when Petitioner was taken before

him on the evening of Petitioner's arrest, when the record shows conclusively that the magistrate's self-disqualification occurred immediately *after* his probable cause determination and prior to Petitioner's arrest, by announcing his disqualification to the FBI agent who presented the affidavit for the arrest warrant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon are the Fourth and Fifth Amendments to the Constitution of the United States and 28USC§455(a). The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched; and the persons or things to be seized." U.S.C.A. Amend. 1 to 4

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia; when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

> be taken for public use, without just compensation". U.S.C.A. Amend. 5

28USC§455(a) provides as follows:

> "Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned". As amended December 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609.

The amendment effective October 1, 1979 omits any reference to referee in bankruptcy. However, the office of *magistrate* is included in both the 1974 and 1979 amendments.

STATEMENT OF THE CASE

I.

The Case in the District Court

This petition arises from an opinion issued on September 17, 1979 by the Fifth Circuit affirming Petitioner's conviction of conspiracy to kidnap. On January 11, 1980 the Fifth Circuit denied petition for rehearing.

Petitioner, Earl J. Gorel, was charged in a three-count indictment together with Raymond Puscedu and Armando Luna and unindicted co-conspirators Richard Rodriguez and Lizandro Tijerina-Gutierrez with conspiracy to kidnap Douglas Schnitzer in violation of Title 18, United States Code, Section 1201; and with conspiracy to send a ransom note through the United States Mail for the release of Douglas Schnitzer, in violation of Title 18, United States Code, Section 371. The jury convicted Petitioner of conspiracy to kidnap and acquitted him of conspiracy to use the United States Mail to send a ransom note.

II.

The Case in the Fifth Circuit

On September 17, 1979, the Fifth Circuit issued its decision affirming Petitioner's conviction of conspiracy to kidnap by holding with regard to the probable cause attack on the arrest warrant:

> "The district court could properly determine that the information in the affidavit was reliable because the informant was a confessed participant in the conspiracy. See United States vs. Harris, 403 U.S. 573, 583, 91S.Ct. 2075, 29L.ED. 2d723(1971)".

The only reference to the magistrate problem consists of several factual observations, all disputed here, regarding the time and reason for disqualification:

> "Gorel was arrested at 5:42 p.m. and arrainged at about 10:30 a.m. the next day. When Gorel was taken before a magistrate on the evening of his arrest, the magistrate disqualified himself from the proceedings because he was related to Gorel's wife."

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Fifth Circuit Erred In Holding That The Arrest Warrant For Petitioner Was Issued Upon Probable Cause Because The Issuing Magistrate's Failure To Disqualify Himself Prior To His Probable Cause Determination Violates Petitioner's Constitutional Rights Under The Fourth Amendment To The United States Constitution And His Rights Under 28USC§455(a).

II.

The Fifth Circuit Erred In Holding That The Arrest Warrant For Petitioner Was Validly Issued Because The Magistrate's Own Actions Demonstrate That He Was Not A "Neutral and Detached" Magistrate.

III.

The Fifth Circuit Erred In Holding That The Arrest Warrant Was Issued Upon Probable Cause Because The Magistrate's Delay Of Self-Disqualification Until Immediately After The Probable Cause Determination Violates Petitioner's Guarantee Of Due Process Of Law Under The Federal Constitution.

IV.

The Fifth Circuit Erred In Its Finding That The Magistrate Disqualified Himself "Because He Was Related To Gorel's Wife," Because The Magistrate's Own Testimony Fails To Identify That Specific Reason And Permits Wide-Range Speculation As To The Reasons For Self-Disqualification.

V.

The Fifth Circuit Erred In Its Factual Determination That Petitioner Was Taken Before A Magistrate On The Evening Of His Arrest Because The Record Shows Conclusively The Contrary, i.e. That He Was Not Taken Before A Magistrate At That Time Nor Until The Late Morning Of The Day Following His Arrest.

VI.

The Fifth Circuit Erred In Its Factual Determination And Implied Finding That The Magistrate Disqualified

Himself When Petitioner Was Taken Before Him On The Evening Of Petitioner's Arrest, Because The Record Shows Conclusively That The Magistrate's Self-Disqualification Occurred Immediately *After* His Probable Cause Determination And Prior To Petitioner's Arrest, By Announcing His Disqualification To The FBI Agent Who Presented The Affidavit For The Arrest Warrant.

Reasons for allowance of the Writ I thru VI have been grouped together because they all relate to the issue of the magistrate.

STATEMENT OF THE CASE MATERIAL TO THE MAGISTRATE ISSUE

Appellant contends that the arrest warrant in this case was issued by a magistrate who was *not* neutral. The arrest warrant was signed by the Honorable Norman Black on February 14, 1978, (Motion to Suppress, p.22) and then the Honorable Norman Black decided he would have no further participation in the case dealing with the Defendant-Appellant. (Motion to Suppress, p.20). The magistrate answered in the affirmative to the following question:

> "Did you, because of your knowledge of the defendant, Gorel, excuse yourself from further participation in this case thereafter or advise the agent to go to one of the other magistrates?" — (Motion to Suppress, p.20).

The point is that the magistrate should have disqualified himself from the very beginning. He obviously felt that he should disqualify himself. (Motion to Suppress, p.16).

But to issue the warrant, a threshold action of great significance, and then to conclude that disqualification was proper, is tantamount to violating the very principle the Fourth Amendment is designed to protect, i.e., to interpose

a *neutral* magistrate between the citizen and the police thus requiring than an *objective* mind "pass on the desires of the police". *McDonald* v. *United States,* 335 U.S. 451, 456 (1948).

Further analysis shows the spectre of police pressure that appeared to have been exerted on the magistrate. For example, the magistrate testified to signing the warrant, "after 5:30" P.M. on February 14, 1978 (Motion to Suppress, p.). FBI Agent Russ testified that Defendant-Appellant was arrested at 5:42 P.M. on that day (Motion to Suppress, p.35). Russ further stated that he had been at Defendant-Appellant's home at 3:00 o'clock on February 14, 1978, to arrest him but that he was not at home. (Motion to Suppress, p.48); and that if Defendant-Appellant had been home, he would have arrested him and taken him to a magistrate that afternoon (Motion to Suppress, p.48). In other words, the FBI was planning at first to arrest Defendant-Appellant without a warrant, presumably under the authority of 18 U.S.C.A., §3052.

The magistrate testified that during the month of February, 1978, he was primarily responsible for "duty" — such as issuing warrants and handling initial appearances (Motion to Suppress, p. 14); that the affidavit for the arrest warrant of Defendant-Appellant contained substantially the same information as prior affidavits the judge had seen in connection with issuing warrants for the other defendants (Motion to Suppress, p. 17); but that the affidavit containing the name of Defendant-Appellant was not seen by him until about a half hour prior to the issuance of the warrant (Motion to Suppress, p. 17,18). *In short, the Judge's acquaintance with prior affidavits in this case dealing* with *other suspects and the hurried attitude of the FBI to arrest the Defendant-Appellant without or with a warrant were*

two key circumstances prevailing at the time Judge Black issued the arrest warrant for Gorel; however, fully well-knowing *at the time* of issuing the warrant that he should disqualify himself because of the magistrate's prior knowledge of Gorel or his wife — or his relationship to them (Motion to Suppress, p.16).

Obviously, in retrospect, Judge Black should have referred the affidavit for Gorel's warrant to another judge. Under the circumstances prevailing, — hurry and rush by the FBI to get the warrant issued, the judge's familiarity with prior affidavits, and the appearance of a name causing the judge to disqualify himself, all combined here to make the judge a mere rubberstamp for the FBI — to the extent at least that he refused to put them off with *an initial disqualification.* This does not comply with the mandatory Constitutional standard imposed by the Fourth Amendment.

ARGUMENT AND AUTHORITIES MATERIAL TO THE MAGISTRATE ISSUE

Defendant-Appellant contends that his constitutional right to due process of law and his rights under the Fourth Amendment to the United States Constitution were critically violated by the magistrate's failure to disqualify himself from the case ab initio.

First of all, it is well established that the "purpose of the warrant requirement is to slow down the police by requiring them to write down their reasons for a neutral magistrate to pass on before they intrude on the privacy or property right of the citizen." *McDonald* v. *United States,* 335 U.S. 451, 455, 69 S.Ct. 191, 93 L.Ed 153 (1948). In *McDonald,* the United States Supreme Court interpreted the term "neutral magistrate" with the following exposition:

> "Absent some grave emergency, the Fourth Amendment had interposed a magistrate between the citizen and the police. This was done not to shield criminals nor make the home a safe haven for illegal activities. It was done so that an objective *mind might weigh* the need to invade that privacy in order to enforce the law." 335 U.S. 455 (emphasis added)

McDonald further stresses that "Power is a heady thing; and history shows that the police acting on their own cannot be trusted" at p. 456. The concept of the magistrate's function which the Constitution mandates is well illustrated in many cases. For a representative sampling, two cases are cited for the Court's convenience. Both the *Johnson* and *Lefkowitz* cases are most frequently cited and quoted in the jurisprudence on this point. *Johnson* v. *United States,* (1948) 333 U.S. 10, 14, 68 S.Ct. 367, 369, 2 L.Ed. 436, 440 states:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate* instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (emphasis added)

In *United States* v. *Lefkowitz,* (1931) 285 U.S. 452, 464. 52 S.Ct. 420, 423, 76 L.Ed. 877, 82 ALR 775, the U.S. Supreme Court said:

> ". . . *the informed* and *deliberate determinations of magistrates* empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests." (emphasis added)

Specifically, the Fifth Circuit has also had occasion to write on the constitutional function of the magistrate such as in the *Chavez* case.

In *United States* v. *Chavez*, 482 F.2d 1268 (5th Circuit, 1973), the Court, in expounding on the "two-pronged test" of *Aguilar*, makes the following far-reaching observation:

> "The theory underlying these twin requirements is that they are dictated by the long-standing principle that determinations of probable cause are to be made by 'neutral and detached magistrates', rather than by 'officers engaged in the often competitive enterprise of ferreting out crime'. *Johnson* v. *United States*, 1948, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 2L.Ed. 436, 440" at p. 1270.

The Fifth Circuit went on to amplify the crucial position and posture of the magistrate in determinations of probable cause as follows:

> "If a magistrate accepted an affidavit which did not meet the first prong of the test, the theory went, he would abandon to the officer his *Constitutional function of making an independent determination;* for his determination would then be entirely dependent upon the officer's judgment of the informant's credibility. Similarly, if he accepted an affidavit not meeting the second prong, he would abandon his function to the informant; then his determination would depend entirely upon the informant's judgment about the facts of the case. (Citing *Aguilar* v. *Texas and United States* v. *Harris*)" at 1270. (emphasis added)

And in United States v. Squella-Avendano, 447 F.2d 575 (5th Cir., 1971), cert. denied 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed. 2d 369, this Honorable Court compares the court's scrutiny in determining probable cause between a warrantless arrest and an arrest with warrant

> "based on the *sound judgment* of an *impartial magistrate.*" at p. 579. (emphasis added)

It was specifically in this comparison of the probable cause determination process that the Fifth Circuit recognized by implication the *consequences* of the constitutional mandate of a *neutral* and *impartial* magistrate when the Fifth Circuit said in Squella-Avendano:

> "Of course, a warrantless arrest requires *closer* scrutiny by the courts in determining whether probable cause exists than would an arrest based on the sound judgment of an impartial magistrate." at p. 579 (emphasis added)

The consequence is that courts simply feel they need *not* look as closely at the probable cause facts where an arrest warrant has been issued than when considering an arrest without a warrant. However, when a magistrate's neutrality and impartiality are impugned and negated by his own self-disqualification as here, the defect cannot be cured by simply taking a little closer look at the probable cause facts. *The issuance of a warrant as here, by itself constitutes a violation of Appellant's due process rights under the Federal Constitution. That stems from the fact that the magistrate knew when he issued the warrant that he should disqualify himself and he so did to the very agent who presented the affidavit for the warrant immediately after issuing the same.* This constitutes a violation of Appellant's rights under the Fifth Amendment to the United States Constitution.

This Honorable Supreme Court passed squarely on the Fourth Amendment problem presented here in *United States* v. *United States District Court For The Eastern District of Michigan,* 407 U.S. 297, 32 LEd 2d 752, 92 S.Ct.

2125 (1972). There this Court stated with respect to the Fourth Amendment:

> "Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate'. Coolidge v. New Hampshire, supra, at 453, 29 L.Ed2d at 575; KATZ v. United States, supra, at 356, 19L.Ed.2d at 585".

This Honorable Supreme Court has frequently stated, as a matter of federal constitutional law, that the person who issues an arrest warrant or a search warrant must be "a neutral and detached magistrate". This Court's cases on this matter are collected in the excellent annotation by Sheldon R. Shapiro, *Requirement, Under Federal Constitution, That Person Issuing Warrant For Arrest or Search Be Neutral and Detached Magistrate* 32L.Ed2d970.

Of similar gravity is the problem as it relates to 28 U.S.C. § 455(a). It is obvious that the term "proceeding" includes the pretrial stage of litigation. This statute deals with disqualification of the judge on his own initiative. The Fifth Circuit position here is clearly in conflict with its pronouncements in *Fredonia Broadcasting Corporation, Inc.* v. *RCA Corporation,* 569 F2d(5 Cir. 1978). There the Fifth Circuit wrote on 28 U.S.C. § 455 (a) and in the course thereof made the following observation:

> ". . . we are concerned with the 'purity of the judicial process and its institutions' KINNEAR-WEED Corp. v. HUMBLE OIL & REFINING CO., 403 F.2d 437, 439-40 (5th Cir. 1968), cert. denied, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971)." at 256

And further, in quoting this Honorable Supreme Court, Stated:

> "The Supreme Court has repeatedly stated that 'justice must satisfy the appearance of justice'. (citing Supreme Court Cases) at 256.

It is rather obvious that the judicial system must be protected from the appearance of inpropriety in the eyes of both the parties and the general public. The conduct of the magistrate here clearly violates 28 U.S.C. § 455 (a) as interpreted by the Fifth Circuit and such conduct should clearly not be condoned by this Court. MARCIA G. ROBESON, *Construction and Application of 28 USCA §455(a) Providing for Disqualification of Justice, Judge, Magistrate, or Referee In Bankruptcy In Any Proceeding In Which His Impartiality Might Reasonably Be Questioned,* 40 ALR Fed 954; Terri J. Lacey, *Disqualification of Federal Judges: Statutory Right to Recusal And The 1974 Amendments to Title 28,* 31 SWLJ 887 Fall 1977; Martin, *Disqualification of Federal Judges for Bias under 28 USC Section 144 and Revised Section 455, 45* Fordham L Rev 139, 1976-77; Note, Disqualification of judges and justices in the Federal Courts, 86 Harvard L Rev 736, 1972-73.

THE FIFTH AMENDMENT

United States v. *Parish,* 468 F.2d 1129 (U.S.App.D.C. 1972) cert. denied, 93 S.Ct. 1430, 410 U.S. 957, 35 L.Ed.2d 690, states the dimension and content of Appellant's rights:

> "The Fifth Amendment . . . . insures among other things that 'no person shall be . . . . deprived of life, liberty, or property, without due process of law. Essential fairness is a fundamental due process requirement in criminal prosecutions' . . . ."

The guarantee of due process of the Fifth Amendment has evolved over the years from the basic minimal rights of right to counsel, right to plead not guilty and the right to be tried in a courtroom presided over by a judge, *Rideau* v. *State of Louisiana,* 373 U.S. 723, 83 S.Ct. 1417 (1963) to encompass the pre-trial stage of criminal proceedings. The requirement of due process in obtaining a conviction is

greater now than the due process standard which once was met "when one present in court is convicted of crime after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." In analyzing the evolution of the due process concept, *United States* v. *Toscanino,* 500 F.2d 267 (2nd Cir, 1974), notes that the requirement of due process extends to the pretrial conduct of law enforcement authorities and concludes with a definitive statement on the present scope of due process:

> ". . . . the Supreme Court's expansion of the concept of due process, . . . now protects the accused against pre-trial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part."

Thus, when the magistrate issued the warrant, then disqualified himself to the agent and failed to send the agent to another magistrate, the agent *knew* that the warrant was not issued by a neutral and impartial magistrate. The agent's failure to seek out another magistrate, but rather, to proceed to execute the warrant that was issued, constitutes pre-trial illegality prohibited by the Fifth Amendment to the Federal Constitution. As the record quite clearly reflects, the magistrate's basis for self-disqualification was not "because he was related to Gorel's wife" as the Fifth Circuit claims. From the record a wide range of speculation for the reason or reasons for disqualification is justified (Motion to Suppress, p. 16, 20). Consequently, what happened here is that the magistrate's violation of Appellant's rights under the Fourth and Fifth Amendments to the Federal Constitution became the violation of Appellant's rights by the FBI agent. The result quite obviously is *actual prejudice* in that the combined action here resulted in the issuance and execution of an arrest warrant violating Appellant's rights. This Court is respectfully advised that

a showing of actual prejudice is not necessary here. In *Curry* v. *Secretary of Army,* 595 F.2d 873 (U.S. APP. D.C. 1979) it was held that

> ". . . . a showing of actual prejudice is not a prerequisite to finding a conviction constitutionally invalid on due process grounds. If a procedure 'involves such a probability that prejudice may result', it will be struck down and the conviction reversed." at p. 876

What process is due, of course, depends upon "an analysis of the interest of the individual and those of the regime to which he is subject". *Middendorf* v. *Henry,* 425 U.S. 25, 43, 96 S.Ct.1281, 1291, 47 L.Ed.2d 556 (1976). The United States Supreme Court, in reviewing a due process complaint as a result of preindictment delay, stated as follows:

> "Judges are not free, in defining 'due process', to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'." *United States* v. *Lovasco* 97 S.Ct. 2044 (1977)

The Fifth Circuit in *Chavez,* supra, reiterated the intrinsic connection between the two-prong test of *Aguilar* and the constitutional mandate of a neutral and impartial magistrate by showing that the *key* formulation of the *Aguilar* test is based on that constitutional mandate:

> "The theory underlying these twin requirements is that they are dictated by the long-standing principle that determinations of probable cause are to be made by 'neutral and detached magistrates', rather than by officers engaged in the often competitive enterprise of ferreting out crime'."

Therefore, when the masitrate, as here, applies his personal and private notions of fairness as to what he can do prior to his self-disqualification, he is disregarding the limits that bind judges in their judicial function — and that

limit is his constitutional function of making an independent probable cause determination — if he is neutral, impartial and detached. Since that is a constitutional requirement, the due process violation here does not need to meet the test of whether 'fundamental conceptions of justice which lie at the base of our civil and political institutions' are violated. The magistrate's constitutional function and position is part of our fundamental conceptions of justice. The violation occurring here is a violation of due process and of the Fourth Amendment. Further, the magistrate imposed on the FBI agent his personal and private notions of fairness which resulted in the FBI's executing a warrant they knew was issued by a magistrate who was not neutral. That is a violation of Appellant's due process guarantee under the Fifth Amendment.

REASONS FOR ALLOWANCE OF THE WRIT

VII.

The Fifth Circuit Erred In Holding That The Arrest Warrant Issued Upon Probable Cause.

VIII.

The Fifth Circuit Erred In Holding That The Informant In The Affidavit For The Arrest Warrant Was Reliable Because The Informant Was A Confessed Participant In The Conspiracy as per *United States* v. *Harris*, 403 U.S. 573 (1971)

STATEMENT OF THE CASE MATERIAL TO THE PROBABLE CAUSE ISSUE

THE AFFIDAVIT

The affidavit supposedly providing the "probable cause" is structured in thirty five (35) separate paragraphs. Out

of these, only five (5) contain any references to a "Mr. Green" and Gorel. For the sake of clarity, the following breakdown is made:

Paragraph 1 of Affidavit:

"In a private meeting Puscedu told Rodriquez he had a friend from New York, code name Mr. Green, who had been involved in a business deal with Kenneth Schnitzer, a wealthy Houstonian. Mr. Green wanted to get some money and enlisted the aid of Puscedo to kidnap one of Schnitzer's sons and hold him for ransom."

Paragraph 6 of Affidavit:

"Puscedu paid all expenses for the trip with a large roll of $100 bills which he said he received from Mr. Green."

Paragraph 8 of Affidavit:

"Puscedo told him Mr. Green had gone to New York to raise additional financing for the plot."

Paragraph 34 of Affiidavit:

"On or about February 9, 1978, FBI agents observed Puscedo meet an individual known to FBI agents as Earl Gorel at the Village Inn near Greenbriar and Old Spanish Trail in Houston, Texas."

Paragraph 35 of Affidavit:

"On February 14, 1978, after being advised of his constitutional rights, and waiving his constitutional rights, Raymond Puscedu advised Special Agent Brian A. Marshall he has known Earl Gorel for approximately twenty years. During 1975, he resided with Gorel at his residence on Willowbend in Houston, Texas. As a result of his staying at this residence, he

was aware Kenneth Schnitzer, Jr., dated a daughter of Gorel.

"Prior to September, 1977, Puscedu stated he went to Gorel with the knowledge that his daughter could obtain information concerning the activities and whereabouts of members of the Schnitzer family. During the Fall of 1977, Puscedu told Gorel he intended to kidnap one of the Schnitzers and he enlisted the aid of Gorel to obtain background information concerning the Schnitzers to help carry out the proposed plot. In this and subsequent conversations, Gorel provided him with background information. Specifically, on or about February 9, 1978, at a meeting at the Village Inn near Old Spanish Trail and Greenbriar, Gorel provided him with the current apartment number and address of Douglas Schnitzer in Tucson, Arizona.

"On February 14, 1978, Kenneth Schnitzer, Jr., advised a Special Agent of the FBI that he knows Marla Gorel, has dated her for some time prior to approximately one year to a year and a half ago. He stated Marla Gorel was living with her parents on Willowbend in Houston at that time but has since moved from her parents' home. He stated Marla told him in about November, 1976, that he was going to Tucson, Arizona, and while there would contact his brother, Douglas Schnitzer."

None of the paragraphs of the affidavit could possibly furnish probable cause for the arrest of Defendant-Appellant. For example, in paragraph six is a reference to Puscedu paying expenses with a roll of $100 bills allegedly received from Mr. Green; then in paragraph eight there is a reference to Mr. Green going to New York to raise additional financing for the plot; *BUT,* paragraph ten refers to a meeting between Rodriquez and Puscedu in which

Puscedu told Rodriquez that the plot would have to be postponed until after *he* could raise more money; paragraph ten clearly shows that the *"he"* is Puscedu and no one else; in order to raise more money for the plot, Puscedu was going to sign on the crew of a ship for thirty or forty days. In fact, Puscedu departed Houston, Texas, aboard the "Gulf Shipper" as determined by FBI agents, according to paragraph seventeen of the affidavit.

Consequently, the affidavit shows a clear cut cause and effect relationship between *raising money* and the *progress* of the conspiracy to kidnap. And it shows clearly that *if* Puscedu is *reliable,* then *he* is the *one* raising the money and the conspiracy to kidnap must wait until Puscedu's efforts to raise money are successful. If, on the other hand, it is "Mr. Green" who is financing the conspiracy to kidnap, then, paragraph ten of the affidavit shows that Puscedu is lying to Rodriquez about needing to raise money for the plot by having to sign on the crew of a ship. The point is: for the *probable cause* analysis, this Honorable Court cannot have it both ways — that is, Puscedu as *reliable* because he confessed to a crime and yet believe that "Mr. Green" is financing the plot. As a matter of fact, the affidavit's paragraphs dealing with the *financing* of the plot would lead a neutral magistrate to believe that if Mr. Green was involved, he had withdrawn from the conspiracy at least at the point when, according to Rodriquez, Puscedu claims *he* has to raise money and therefore the plot would have to be postponed.

Further, Puscedu was observed departing the vessel "Gulf Shipper" by FBI agents on February 6, 1978, according to paragraph 20 of the affidavit. In short, Puscedu was gone from November 29, 1977, to February 6, 1978. According to paragraph 27 of the affidavit, FBI agents monitored a conversation between Rodriquez and Puscedu, who was to

receive $2,000.00 from *an unknown source* on February 13, 1978, with which to help finance the plot. That indeed is significant in the probable cause analysis. Here, where the FBI is monitoring the conversation between Rodriquez and Puscedu, there is *no* reference to a Mr. Green when they talk about money. However, paragraphs 6 and 8 of the affidavit, where there is no FBI monitoring, Puscedu is allegedly making references to a Mr. Green, and to Mr. Green's financing of the plot, according to Rodriquez. It is rather curious that if Mr. Green was financing the plot, his name would not have come up in the monitored conversation between Rodriquez and Puscedu referred to in paragraph 27 of the affidavit! After all, according to Rodriquez, Puscedu has mentioned Mr. Green's financing on several occasions to him.

Clearly, according to the affidavit, Puscedu was under surveillance on February 9, 1978. On that same day, Puscedu is observed meeting with Defendant-Appellant at the Village Inn near Greenbriar and Old Spanish Trail in Houston, Texas. Again, it would not be unreasonable to assume from the affidavit that the FBI kept Defendant-Appellant under surveillance from that point forward. But whether they did or did not keep Defendant under surveillance, there is no mention of any evidence that Defendant-Appellant was furnishing any funds or knew of or participated in any of the arrangements for the kidnapping trip. As a matter of fact, according to the affidavit, one kidnapping attempt had already failed on or about October 29, 1977. Clearly, no probable cause is established as against Defendant-Appellant in the first thirty-four paragraphs of the affidavit.

PARAGRAPH 35 OF AFFIDAVIT

A careful analysis of this paragraph in the affidavit cannot disclose anything but the sheer lack of probable

cause. This paragraph will be analyzed in depth with applicable case authority in the next sections of this Brief.

ARGUMENT AND AUTHORITIES MATERIAL TO THE PROBABLE CAUSE ISSUE

THE AFFIDAVIT

The Fifth Circuit's treatment of the "no probable cause" argument of Petitioner is rather unique. The argument was disposed of in a short two-step maneuver. First, the Court succinctly restated *Aguilar's* two-prong test. Then the Court noted that "the district court could properly determine that the information in the affidavit was reliable because the informant was a confessed participant in the conspiracy", citing *United States* v. *Harris,* 403 U.S. 573, 583, 915 S.Ct. 2075, 29 L.Ed. 2nd 723 (1971). The Fifth Circuit fails to reveal its reasoning and totally fails to discuss *how* the affidavit meets the *Aguilar* and *Harris* holdings. Other cases from that Court, to be discussed herein, have shorter and far less complex affidavits than this case, and yet this Court has always gone to great pains in turning away or accepting a "no probable cause" attack by demonstrating *why* the particular affidavit meets or fails to meet the factual and legal requirements of the probable cause determination. The Court's absolute refusal here to employ the same technique almost leads one to believe that the Fifth Circuit does not want to expose its reasoning. This smug, almost "no comment" attitude of the Court on such a vital argument is not a commendable technique for appellate decision-writing and raises under the circumstances here, serious questions on why the Court handled the argument of Appellant in the short-shrift fashion reflected in the opinion.

It is respectfully submitted that the Fifth Circuit is changing or attempting to change the application of *Aguilar*

and subsequent cases thereunder and that the holding here is in clear conflict with *Aguilar* and its progeny. This is accomplished in part by Fifth Circuit's misinterpretation of the significance of an admission against penal interest by an informant in determining his credibility, or the reliability of his information. In addition, in upholding the probable cause determination here, the Fifth Circuit has simply failed to take account of other legal principles firmly embedded in the probable cause jurisprudence.

A. After Gorel, what does United States v. *Harris mean in the Fifth Circuit?*

From the brief handling of the probable cause problem here and the citing of *Harris,* it appears that according to the *Gorel* decision, *United States* v. *Harris* stands for the clearcut proposition that an informant's information in an affidavit for an arrest is deemed *reliable* if the informant is a confessed participant in a crime with which the affidavit deals. That is *not* the holding of *United States* v. *Harris* and this Honorable Court's attention is invited to the fine exposition of *Harris* in *United States* v. *Chavez,* 482 F.2d 1268 (5 Cir. 1973). In analyzing *Harris* in *Chavez* which came two years later, the Fifth Circuit observed that in *Harris* "the difficulty was whether the first prong, the requirement of details supporting a conclusion that the informant was credible was met." *Chavez,* at p. 1271. The Fifth Circuit, in referring to the *Harris* Court *then* stated:

> "The Court found that it was, on the basis of a cumulation of four different circumstances. These were: (1) the allegation of the affiant that he regarded the informant as 'prudent'! (2) the detail provided in the tip; (3) the fact that the accused had a reputation for being a trafficker in non-tax paid liquor; and (4) the fact that the information given, with the allegations of the informant's purchases, was a declaration against the informant's penal interest." at p. 1271.

Thus, it is quite obvious that in *Harris,* the significance of an admission against penal interest by an informant is not either the *sole* or *primary* factor in satisfying the *first* prong of the two-prong *Aguilar* test. It is only *one* factor which was weighed by the Court in *Harris.*

Again, in adjudicating a contention that an arrest was not supported by probable cause in *United States* v. *Ashley,* 569 F.2d 975 (1978), the Fifth Circuit properly held that an admission against penal interest is one of *many* cumulating factors to be considered. The Court stated:

> "Although an admission against penal interest without more, is not enough to justify a finding of probable cause, see United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); United States v. Chavez, 482 F.2d 1268, 1271 (5 Cir. 1973), *it is apparent that such an admission is one of many cumulating factors to be considered.*" (emphasis added)

In *Ashley,* the Fifth Circuit properly interpreted *Harris* and *Chavez* in that an *admission* against penal interest without more is not enough to justify a finding of probable cause but that such an admission is one of many cumulating factors to be considered. Surely, the Court's explicit holding in the present case conflicts with these decisions. It does not appear that the Fifth Circuit even attempted a *cumulative factor-weighing process* which Petitioner contends is mandated by the Constitution and case precedent. Thus in Ashley, for example, great significance was attached to independent verification by the FBI of information furnished by the informant. Even in *Wooten* v. *United States,* 380 F.2d 230 (5 Cir., 1967) a pre-*Harris* case involving a challenge of an arrest without a warrant, the Fifth Circuit felt compelled to weigh additional factors along with an informant's inculpatory admissions. In *Wooten,* it was held:

"Information, however, which comes from a known perpetrator of a federal felony, concerning another who is involved with him, is entitled to greater weight than mere hearsay information concerning an alleged offense. Bowers' inculpatory admissions to Agent Vial, together with the other evidence of Bower's guilt, gave credence to his positive identification of Wooten as the man who supplied him with the counterfeit money which he had uttered on the previous day." at p. 232

B. What is the proper legal test for probable cause in this case?

First, the beginning point is *Aguilar* v. *Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). *Aguilar* provides the two-pronged test by which we measure the effect of an informant's reliability on an officer's determination of probable cause. To rely on an informant's report to establish probable cause, it must affirmatively appear that the agents were informed of 1) some of the underlying circumstances from which the informant concluded that his information was accurate, and 2) some of the underlying circumstances from which the officer concluded that the informant was "credible" or his information "reliable". Thus, under this two-prong test, there must be an indication that the informant gathered his information in a reliable manner and the informant must be a credible person or his information must be reliable. *United States* v. *Ashley,* 569 F.2d 975 (5 Cir., 1978); *United States* v. *Squella-Avendano,* 447 F.2d 575 (5 Cir., 1971) cert. denied, 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.2d 369 (1971). However, in applying this basic test in the determination of probable cause for specific situations, certain rules have been developed as a guide. Even though it may not be accurate to use the term "rule" in its technical connotation, nevertheless, guidelines in evaluating an informer's report are established.

1. GUIDELINES FOR TESTING WHETHER AGUILAR REQUIREMENTS HAVE BEEN MET.

If the information provided is in such "detail" and "minute particularity" that a magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way, then the report, if sufficiently incriminating, may, without more, be grounds for finding probable cause. *Spinelli* v. *United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Draper* v. *United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1958).

Less detailed information from a reliable source may be used as grounds for a finding of probable cause if independent investigation by law enforcement agencies yields sufficient verification or corroboration of the informant's report to make it

"apparent that the informant had not been fabricating his report out of whole cloth. Corroboration must render the report 'of the sort which in common experience may be recognized as having been obtained in a reliable way'." *SPINELLI,* supra; *DRAPER,* supra; Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); Rodgers v. United States, 442 F.2d 902 (5 Cir. 1971); Thompson v. White, 406 F.2d 1176 (5 Cir. 1969).

If an informant's report does not under the above two guidelines establish probable cause, such report may count in the magistrate's determination of probable cause, but only as one of a number of other factors of "further support" tending to show probable cause. Examples of satisfactory "further support" given in *Spinelli* involved law enforcement agencies' knowledge of independent facts which suggest criminal conduct or of facts which take on an aura of suspicion in light of the informant's tip.

Whiteley v. *Warden, Wyoming Penitentiary,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) furnishes an additional rule that the belief of the arresting officer, or the informant, or both, that a suspect is involved in activity that is criminal in nature must be directly supported by information that is reliable within the meaning of *Aguilar* and Spinelli. This means that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone — but the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony.

2. UNITED STATES v. HARRIS

For purposes of the application of guidelines by this Honorable Court in this Case, Appellant respectfully points out the Fifth Circuit's reception of the *Harris* case.

In *Squella-Avendano,* supra, the Fifth Circuit observed that *Harris* indicates the showing which is constitutionally required in order to credit information of a police informer's personal knowledge of criminal activity. The *Squella-Avendano* decision precedes the Fifth Circuit's analysis of *Harris* in *Chavez* by two years. In *Squella-Avendano,* the Fifth Circuit further observed that *Harris* declined to apply *Spinelli* to the extent that it prohibits a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation. In other words, in *Chavez* the Fifth Circuit read *Harris* in regard to the first prong of *Aguilar* that one of the factors the magistrate could consider was "the fact that the affidavit also alleged that the accused had a reputation for being a trafficker in non-tax paid liquor."

This is of crucial importance in this case as will be outlined in the subsequent discussion of *why* the Fifth Circuit is upholding probable cause based on *Harris.*

C. *Application of Foregoing Guidelines to Affidavit in this case*

1. DOES THE AFFIDAVIT DISCLOSE THAT THE AGENTS WERE INFORMED OF SOME OF THE UNDERLYING CIRCUMSTANCES FROM WHICH THE INFORMANT CONCLUDED THAT HIS INFORMATION WAS ACCURATE?

The Affidavit in this case relies on three informants, namely, Rodriquez, Gutierrez and Puscedu. In addition, the Affidavit contains allegations of FBI efforts to verify certain information. As to *GOREL,* the Affidavit contains no allegations by the affiant, FBI Agent Jack N. Sheridan, that he regards Rodriquez, Gutierrez or Puscedu "credible", "reliable" or as in *Harris,* "prudent". As to *GOREL,* the Affidavit contains no allegations regarding Gorel's *reputation,* such as in *Harris.* The Affidavit does contain allegations of participation by Rodriquez, Gutierrez and Puscedu in a kidnapping conspiracy — all clearly being declarations against their respective penal interests. Finally, what about the detail provided by the self-declared kidnap conspirators to create probable cause against Gorel?

The first ten paragraphs of the Affidavit, information furnished by Rodriquez to a Special Agent of the FBI, not the affiant, contain three references to a Mr. Green (paragraphs 1, 6 and 8). And all three references to Mr. Green related by Rodriquez, involve what Puscedu, another conspirator, allegedly said to Rodriquez about Mr. Green. Therefore, the references to Mr. Green in the first ten paragraphs about Mr. Green are related by Puscedu to Rodriquez who disclosed this information on November 15, 1977,

to an agent of the FBI who is not the affiant. Even if Rodriquez truthfully related what Puscedu told him about a Mr. Green, there is no indication at all that Puscedu's references were not sheer fantasy. Why? Because the Affidavit contains no underlying circumstances from which the *affiant* could conclude that Rodriquez concluded that his information about Mr. Green was accurate. In fact, the Affidavit tends to show that Rodriquez could more easily than not conclude his information was *not* accurate and so the *affiant* should have concluded. This stems from the Affidavit's discrepancies about Mr. Green's supposed financing of the plot. Starting with paragraph 11 of the Affidavit, Rodriquez becomes an active *participant-informer* for the FBI who use him to monitor developments of the kidnap conspiracy. Peculiarly, from that point forward, namely paragraph 11 through and including paragraph 33, the FBI acquires no more information or any *verification* of any information regarding a Mr. Green. As a matter of fact, according to the Affidavit, FBI agents monitor a conversation between Rodriquez and Puscedu (paragraph 27) on February 9, 1978, at which time finances are discussed between the two. There is no reference by Puscedu to a Mr. Green, only a reference to an "unknown source". Surely, since Rodriquez claims to have related to the FBI on November 15, 1977, that Puscedu told him about a Mr. Green and his alleged involvement, it appears rather strange that now, on February 9, 1978, when Rodriquez is a *participating informant* and knows that the FBI is monitoring his conversations with other conspirators, he would not at least bait Puscedu about Mr. Green in any manner whatsoever! Perhaps his failure to do so was motivated by his concern that his credibility would be impugned — surely a logical inference to be drawn by a *neutral* magistrate. Another point of grave consequences to Rodriquez' reliability of information he claims was relayed to him by Puscedu about Mr. Green's

involvement in, by financing, the plot: On November 15, 1977, Rodriquez claims that he met with Puscedu who told him that the plot would have to be postponed until he, Puscedu, could raise more money (paragraph 10). Puscedu was going to raise this money by signing on the crew of a ship. A logical inference as to Mr. Green would clearly be that Mr. Green is not financing the plot. That would certainly be corroborated by the February 9, 1978-FBI monitored conversation between Rodriquez and Puscedu! Additionally, Puscedu's activity was verified by FBI surveillance (paragraphs 17 and 20) upon his departure on November 29, 1977, and his return on February 6, 1978.

As to the first 33 paragraphs of the Affidavit, Appellant strenuously urges the following factual contentions:

1. That the *affiant,* FBI Agent Jack M. Sheridan, was *not* informed of *any* underlying circumstances from which the informant Rodriquez concluded that his, Rodriquez's, information about Mr. Green was accurate.

2. That the *affiant,* FBI Agent Jack M. Sheridan, was *not* informed of any underlying circumstances from which the informant Puscedu concluded that his, Puscedu's information about Mr. Green, as related by Rodriquez, was accurate because the verification of Puscedu's activities contained in these paragraphs leads to no inference to the accuracy of what Rodriquez claims Puscedu said about Mr. Green.

3. That the affiant, could only properly conclude that the conspiracy to kidnap back in October 28, 1977, failed because Douglas Schnitzer could not be located and that none of the conspirators, Rodriquez, Puscedu and Gutierrez had received information regarding Schnitzer's address from anyone.

PARAGRAPH 34 OF THE AFFIDAVIT

Of what possible *probable cause* significance is the meeting between Puscedu and Gorel observed by FBI agents on February 9, 1978 — (paragraph 34)? Beginning on February 6, 1978, when Puscedu returned on the "Gulf Shipper", (paragraph 20) he was under FBI surveillance and clearly for good reason! Paragraphs 20 through 34, which covers the period of February 6, 1978, to February 13, 1978, the Affidavit details many of Puscedu's activities as a result of FBI surveillance. Clearly, there is nothing incriminating or suspicious about the meeting. Needless to say, the FBI was highly suspicious of Puscedu at this point, but *what* evidence besides suspicion rendered the meeting meaningful to the FBI. Here, there is nothing but suspicion by *association.* Clearly, if the FBI interpreted Rodriguez's references to a Mr. Green as a tip that Gorel was Mr. Green, an inference totally unjustified on the allegations of the Affidavit, and assuming that Rodriquez, as a self-confessed conspirator-turned FBI informer, is accorded great credibility under *Harris,* we still face *Whitely* v. *Warden, Wyoming Penitentiary,* supra, which this Honorable Court recognized as holding that:

> "the belief of the arresting officer, or the informant, or both, that the suspects are involved in activity that is criminal in nature must be directly supported by information that is reliable within the meaning of Aguilar and Spinelli." at p. 580-581.

This means, as the Court noted in *Whitely,* that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause that could not adequately be supported by the tip alone, but the additional information acquired by arresting officers must in some sense be *corroborative* of the informer's tip that the arrestees committed the felony. Thus, even if the affiant here and Rodriquez suspected that Mr. Green was Gorel, the meeting between Puscedu and Gorel on February 9, 1978, certainly does not constitute "additional information" that is corroborative of Rodriquez's tip that there is a Mr. Green involved in the conspiracy. Further, even under *Jones* v. *United States,* 362 U.S. 257, 80 S.Ct. 725 4 L.Ed.2d 697 (1962), which this Court claims was given new life and meaning by *Harris* as per *Squella-Avendano,* the hearsay quality of Rodriquez's tip has no substantial basis.

PUSCEDU TURNED INFORMER IN PARAGRAPH 35 OF THE AFFIDAVIT

What particular facts here come into play to justify a probable cause finding in an affidavit clearly *so far* lacking in probable cause as to Gorel? The Fifth Circuit has erroneously concluded that *United States* v. *Harris* applies and solves the affidavit's probable cause problem.

It is true that this paragraph furnishes very specific information about Gorel's family situation — namely that Gorel's daughter at one time dated Kenneth Schnitzer, Jr., the brother of Douglas. Puscedu knew this to be a fact and said fact was independently corroborated by the FBI. The underlying circumstance for crediting Puscedu's information is clearly his statement that he resided with Gorel at his residence in 1975. So far, all this information is corroborative of the fact that Puscedu, the kidnapper, connected up his awareness of Schnitzer by residing with Gorel and becoming aware of Schnitzer through Gorel's daughter.

But what specifically could link Puscedu's "information" to probable cause for the arrest of Gorel? It is Puscedu's allegations that he

1) Told Gorel he, Puscedu, was aware Gorel's daughter could get information about the Schnitzers;

2) Told Gorel he intended to kidnap a Schnitzer family member;

3) Enlisted the aid of Gorel to obtain background information on the Schnitzers;

4) Obtained background information on the Schnitzers from Gorel;

5) Obtained from Gorel on February 9, 1978, a current apartment number and address of Douglas Schnitzer.

These allegations cannot possibly meet any of the applicable guidelines for probable cause determination.

The above five allegations of Puscedu do not come within the "personal knowledge" requirements of *Harris* to meet the second prong of the *Aguilar* test, because the allegations reveal nothing about what Puscedu learned from Gorel; rather the allegations reveal what Puscedu claims he *told* Gorel about his plans and intentions. Further, the Affidavit, particularly the first ten paragraphs showing the failure to locate Schnitzer back on October 28 and 29, 1977 (paragraphs 3-8), indicates that certainly no verifiable information could have been furnished by Gorel, because the plot was to be carried out then, and Puscedu couldn't locate Schnitzer. Consequently, none of the allegations made by Puscedu, the informer, are verified by the FBI nor are they verified by any parts of the Affidavit. Certainly these allegations lack the "detail" and "minute particularity" discussed in *Spinelli,* supra. Further, these allegations, though less detailed, have not and were not verified by independent investigation by law enforcement agencies. As a matter of fact, nowhere does Puscedu allege in the Affidavit that Gorel had any involvement with financing the conspiracy, an omission casting additional doubt on the information-gathering reliability of Rodriquez.

Here there is no volume or quality of information clearly describing the accused's criminal activity in sufficient detail such as in *Squella-Avendano.* There is nothing in Puscedu's accusations that would lend credibility that Gorel had been furnishing information about the Schnitzers for any period of time. Even in *Harris,* the Supreme Court noted:

> "Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another."

In short, *Harris* does *not* stand for the proposition that an informer's declaration against penal interest without more justifies a finding of probable cause against another who is implicated by the informer's declaration against his own penal interest. Surely, the only possible link might remain, Puscedu's allegation concerning the meeting with Gorel. That meeting was not but could have been monitored by the FBI. That would have lent or denied corroboration to Puscedu's allegation regarding the purpose of the meeting. However, said allegation without more creates the inference that if what Puscedu says is true about Gorel furnishing information, it must have taken Gorel over a a year and a half to get a good address on Douglas Schnitzer. *Harris* held as to the allegations there that

> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements." p. 2082.

Would common sense in the important daily affairs of life induce a prudent and disinterested observer to credit these statements because of that inference. Clearly not. *If* Gorel is the man with the *money* who, according to paragraph one of the Affidavit wanted to get some money, surely he would do one thing and wouldn't do another: namely, he would get the address in 1977 and would not

spend a year or so "furnishing" unspecified information to Puscedu and probably wouldn't need to meet him face to face in a restaurant. The point is that probable cause against Gorel is not supported by *Harris;* rather Gorel demonstrates what *Harris* allowed for and that is that admissions of crime do not always lend credibility to contemporaneous or later accusations of another. Finally, nowhere in the Affidavit is there an allegation by FBI agents that the address Puscedu claimed he obtained from Gorel on February 9, 1978, was in fact an address of Douglas Schnitzer. Where such an accusation, of such crucial nature could have been verified by law enforcement officers and was not so contained in the Affidavit, then a finding of probable cause such as here is in violation of the Fourth Amendment which prohibits the substitution of police action based upon suspicion, belief or mere conclusion for the independent determination, both impartial and prudent, of a neutral and detached magistrate.

CONCLUSION

An illegal arrest constitutes a seizure of the person in violation of the Fourth Amendment. *Henry* v. *United States,* 361 U.S. 98, 100-101, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). The arrest in this case was illegal. All evidence obtained as a result thereof should have been properly excluded from Appellant's trial. No case directly in point has been found regarding the magistrate's violation of Appellant's constitutional rights. This Honorable Court should examine this matter and write on this point. Appellant's Fifth Amendment rights were violated by the FBI. Further, the analysis and application of *United States* v. *Harris* is seriously eroded by this Court's treatment of the significance of an informant's declaration against his penal interest in a probable cause analysis. Finally, the Fifth Circuit's holding on probable cause as to Appellant violates *Aguilar* and the guidelines set out in outlined case precedent. For these reasons, a writ of certiorari should be issued to review the judgment and order of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Solicitor General, Department of Justice Room 5614 Washington, D.C. 20530 by depositing the same in the United States Mail, certified mail return receipt requested with air mail postage prepaid on this 21st day of February, 1980.

H. A. Erwing

H. A. Erwing

APPENDIX A

UNITED STATES v. GOREL

United States of America,
Plaintiff-Appellee,

v.

Earl J. Gorel,
Defendant-Appellant.

No. 78-5592

United States Court of Appeals,
Fifth Circuit

Sept. 17, 1979

Defendant was convicted before the United States District Court for the Southern District of Texas, at Houston, John V. Singleton, Jr., J., of conspiracy to kidnap, and he appealed. The Court of Appeals, Roney, Circuit Judge, held, inter alia, that: (1) district court did not abuse its discretion in denying defendant's motion for change of venue due to pretrial publicity, as defendant's evidence failed to show the degree of media-engendered "pervasive community prejudice" which might warrant a presumption of deprivation of due process; furthermore, defendant failed to show that actual prejudice infected the opinions of the jurors as a result of pretrial publicity; (2) defendant's motion for a bill of particulars was properly denied, where no showing was made that the matters requested were necessary to inform defendant of the charge against him with sufficient precision to enable him to prepare his defense or avoid surprise, nor were they shown to be necessary for pleading his acquittal or conviction in bar of further prosecution for the same offense; and (3) the delay of 16½ hours in bringing defendant before a

magistrate for arraignment was not unreasonable under the facts of the case.

Affirmed.

1. Criminal Law — 121

District court did not abuse its discretion in denying defendant's motion for change of venue due to pretrial publicity, as defendant's evidence failed to show the degree of media-engendered "pervasive community prejudice" which might warrant a presumption of deprivation of due process; furthermore, defendant failed to show that actual prejudice infected the opinions of the jurors as a result of pretrial publiciyt. U.S.C.A.Const. Amends. 5, 14.

2. Constitutional Law — 268(7)

Juror exposure to news accounts concerning the crime with which defendant is charged does not create an automatic presumption of deprivation of due process. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law — 126(1)

Indicative of the absence of juror prejudice from pretrial publicity was the fact that of defendant's ten peremptory challenges, only six were used to strike potential jurors from the case.

4. Criminal Law — 627.6(2)

Denial of defendant's motion to discover and inspect documents did not contravene the requirements of *Brady,* as an examination of the record showed that the information sought was neither exculpatory not related to the statement of any witness.

5. Indictment and Information — 121.2(1)

Defendant's motion for a bill of particulars was properly denied, where no showing was made that the matters requested were necessary to inform defendant of the charge against him with sufficient precision to enable him to prepare his defense or avoid surprise, nor were they shown to be necessary for pleading his acquittal or conviction in bar of further prosecution for the same offense.

6. Indictment and Information — 121.1(3)

Decision of whether or not to direct the filing of a bill of particulars is committed to the discretion of the district court.

7. Criminal Law — 211(3)

Although an affidavit supporting an arrest warrant may be based on hearsay, the affidavit must disclose some of the underlying circumstances on which the informant based his story and some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable.

8. Criminal Law — 211(3)

District court could properly determine that the information in affidavit, supporting arrest warrant, was reliable because the informant was a confessed participant in the conspiracy.

9. Criminal Law — 264

Delay of 16½ hours in bringing defendant before a magistrate for arraignment was not unreasonbale under the facts of the case.

10. Criminal Law — 519(8)

Delay is simply a factor which must be considered along with other factors in determining voluntariness, and such delay must be "unnecessary" before it will render a confession inadmissible. 18 U.S.C.A. § 3501.

11. Criminal Law — 1158(4)

Absent clear error, the Court of Appeals will not upset a trial court's determination that a confession was voluntarily given.

12. Criminal Law — 1158(4)

District court's determination that defendant's statements were voluntarily and freely given was not clearly erroneous.

13. Criminal Law — 1038.2

Although defendant objected to testimony regarding his statements and proffered instructions on duress, he failed to object to the court's jury instructions which omitted a change on duress, and no plain error was demonstrated by the omission.

14. Indictment and Information — 125(5½)

Indictment which charged in separate counts conspiracy to kidnap and conspiracy to use the United States mail to send a ransom note was not duplicitous. 18 U.S.C.A. §§ 876, 1201.

15. Criminal Law — 776(2)

District court's jury charge on the weight given to character evidence was not erroneous; it did not contain objectionable language, and it correctly instructed the jury

to consider reputation evidence in the same manner it considered all other evidence.

16. Criminal Law — 338(1)

Determinations of admissibility of evidence rests largely within the discretion of the trial court.

17 Criminal Law — 342

In prosecution for conspiracy to kidnap and conspiracy to use the United States mail to send a ransom note, the district court's admission of evidence concerning defendant's unsuccessful investment of $41,000 of a coconspirator's money was not reversible error, since the concon-spirator testified that the defendant made a gentlemen's agreement to repay the lost money and that defendant later suggested the kidnapping plan as a possible way to raise the money; thus, the aforesaid evidence of the unsuccessful investment was admissible to show motive. 18 U.S.C.A. §§ 876, 1201.

18. Criminal Law — 438.1

Trial court has broad discretion in determining whether to permit a recording to be played before the jury.

19. Criminal Law — 1158(4)

If there is independent evidence of the accuracy of tape recordings admitted at trial, the Court of Appeals is reluctant to disturb the trial court's decision to permit the recordings to be played before the jury.

20. Criminal Law — 400(1)

Federal Rules of Evidence permit admission of summaries of recordings when the original or copies of the

original are made available to the other party. Fed.Rules Evid. rule 1006, 28 U.S.C.A.

21. Criminal Law — 438.1

Trial court's decision to permit the use of transcripts corresponding to tapes played before the jury was not erroneous. Fed.Rules Evid. rule 1006, 28 U.S.C.A.

22. Criminal Law — 444

Tapes of conversations between defendant and coconspirators were properly authenticated, where extensive testimony was presented by FBI agents who wired the coconspirators with the recording devices; the agents testified to their training and experience in the use of recording devices, the type of equipment used, the procedures used to wire the coconspirators, the chain of custody of the tapes, the transcription of them, and other details concerning the preparation of the tapes.

23. Searches and Seizures — 7(27)

Where one party consents to the government's recording of his conversation with another, there is no violation of the Fourth Amendment. U.S.C.A. Const. Amend. 4.

24. Criminal Law — 753.2(8)

In passing on a motion for judgment of acquittal or, in the alternative, for a new trial, the reviewing court must view the evidence in light most favorable to the government and the jury verdict is entitled to the benefit of all reasonable inferences that might be drawn therefrom.

25. Conspiracy — 48.1(2)

Record demonstrated that there was a sufficient quantum and quality of evidence for the jury to reasonably find

defendant guilty of conspiracy to kidnap. 18 U.S.C.A. § 1201.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Defendant Earl J. Gorel was convicted by a jury of conspiracy to kidnap, 18 U.S.C.A. § 1201, but was acquitted of conspiracy to use the United States mail to send a ransom note, 18 U.S.C.A. § 876. On appeal, defendant seeks reversal because the district court denied his motions for change of venue, discovery. and a bill of particulars; refused to suppress his prearraignment statements; com mitted alleged errors in certain evidentiary rulings; allegedly instructed the jury improperly; and denied his motion for judgment of acquittal or in the alternative for a new trial. Finding no reversible error in any of defendant's contentions, we affirm.

This conspiracy involved a plan to kidnap for ransom the younger son of the owner of a Houston hockey team. At trial the Government's chief witness, Raymond Puscedu, testified that he and defendant Gorel planned and made arrangements to kidnap Doug Schnitzer who was attending school in Arizona. According to Puscedu's testimony, Gorel instructed Puscedu to recruit others to assist in the kidnapping scheme. Gorel and Puscedu's plan was to kidnap Schnitzer in Arizona, transport him to Houston, and make Schnitzer write the ransom note. Gorel intended to set the ransom at one million dollars.

Puscedu recruited two additional conspirators. The first attempt to kidnap failed because they could not locate

Doug Schnitzer. Gorel then supplied Schnitzer's exact address. Without informing Puscedu, the recruits reported the kidnap and ransom plan to the FBI and consented to being wired for sound. Conversations with Puscedu regarding the plan to kidnap Schnitzer were tape recorded. When Puscedu and the two recruits approached Schnitzer's apartment in Arizona on their second kidnap attempt, FBI agents arrested the trio. Following the arrest, Puscedu confessed to the conspiracy. In addition to Puscedu and other witnesses, one of the recruited coconspirators testified at trial.

Each of defendant's numerous contentions on appeal is addressed herein.

[1-3] The district court did not abuse its discretion when it denied defendant's motion for change of venue due to pretrial publicity. Juror exposure to news accounts concerning the crime with which the defendant is charged does not create an automatic presumption of the defendant's deprivation of due process. *Murphy* v. *Florida,* 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *United States* v. *Capo,* 595 F.2d 1086, 1090 (5th Cir. 1979). *See Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 565, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). Defendant Gorel's evidence fails to show the degree of media-engendered "pervasive community prejudice" which might warrant such a presumption. *United States* v. *Capo,* 595 F.2d at 1090-1091. Furthermore defendant has failed to show that actual prejudice infected the opinions of these jurors as a result of pretrial publicity. *See Irvin* v. *Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Indicative of the absence of juror prejudice is the fact that of defendant's ten peremptory challenges, only six were used to strike potential jurors from the case.

[4] The district court's denial of defendant's motion to discover and inspect documents did not contravene requirements of *Brady* v. *Maryland,* 373 U.S. 83. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Examination of the record shows the information sought was neither exculpatory nor related to the statement of any witness.

[5, 6] The trial court properly rejected defendant's motion for a bill of particulars. The decision of whether or not to direct the filing of a bill of particulars is committed to the discretion of the district court. *United States* v. *Cantu,* 469 F.2d 679, 680 (5th Cir. 1972), *cert. denied,* 411 U.S. 908, 93 S.Ct. 1536, 36 L.Ed.2d 197 (1973). No showing was made that the matters requested were necessary to inform the defendant of the charge against him with sufficient precision to enable him to prepare his defense or avoid surprise. Neither were they shown to be necessary for pleading his acquittal or conviction in bar of further prosecution for the same offense. The indictment fairly and adequately apprised defendant of the offenses with which he was charged. *United States* v. *Markham,* 537 F.2d 187, 191 (5th Cir. 1976), *cert. denied,* 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977); *United States* v. *Smith,* 523 F.2d 771, 778 (5th Cir. 1975), *cert. denied,* 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed2d 76 (1976).

[7. 8] Citing *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), and *Aguilar* v. *Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), defendant argues the arrest warrant was defective because it was based solely on an FBI agent's affidavit containing uncorroborated hearsay of coconspirator Puscedu. Hence, he contends all evidence flowing from the "tainted" arrest should have been suppressed. Although a supporting affidavit may be based on hearsay, the affidavit must disclose some of the underlying circumstances on which the informant based

his story and some of the underlying circumstances from which the affiant concluded the informant was credible or his information reliable. *Aguilar* v. *Texas*, 378 U.S. at 114, 84 S.Ct. 1509. The district court could properly determine that the information in the affidavit was reliable because the informant was a confessed participant in the conspiracy. *See United States* v. *Harris*, 403 U.S. 573, 583, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971).

[9] Under the facts of this case the sixteen and one-half hour delay in bringing Gorel before a magistrate for arraignment was not unreasonable. Suppression of statements made by Gorel to FBI agents prior to arraignment was properly refused. Gorel was arrested at 5:42 p.m. and arraigned at about 10:30 a.m. the next day. When Gorel was taken before a magistrate on the evening of his arrest, the magistrate disqualified himself from the proceedings because he was related to Gorels wife. Since no other magistrate was readily available that evening, Gorel was taken to a detention center to await arraignment the next morning. During the drive to the center, nearly an hour away, Gorel admitted to FBI agents that he had procured Schnitzer's address for Puscedu. Before departing for the detention center, Gorel had ben given *Miranda* warnings.

[10] As this Court has previously held, delay is "simply a factor which must be considered along with other factors in determining voluntariness, and such delay must be 'unnecessary' before it will render a confession inadmissible." *United States* v. *Corral-Martinez*, 592 F.2d 263, 267-268 (5th Cir. 1979). The facts here demonstrate the delay was not unnecessary, and the reasons for the delay were not inconsistent with standards contained in 18 U.S.C.A. § 3501 relating to admissibility of confessions.

[11, 12] Arguing that an agent's reference to the possible involvement of defendant's daughter in the conspiracy constituted "thinly veiled threats" which prompted additional admissions by the defendant, the defendant contends a jury instruction on duress was required. Absent clear error, however, this Court will not upset a trial court's determination that a confession was voluntarily given. *United States* v. *Watson*, 591 F.2d 1058, 1061 (5th Cir. 1979); *United States* v. *Vasquez*, 534 F.2d 1142, 1146 (5th Cir.), *cert denied*, 429 U.S. 962, 97 S.Ct. 389, 50 L.Ed.2d 330 (1976). The record reveals no clear error, and the district court's determination that defendant's statements were voluntarily and freely given was not clearly erroneous. *United States* v. *Maxwell*, 484 F.2d 1350, 1352-1353 (5th Cir. 1973).

[13] Although defendant objected to testimony regarding his statements and proffered instructions on duress, he failed to object to the trial court's instructions to the jury which omitted a charge on duress. No plain error has been demonstrated by the omission. *See United States* v. *Pena*, 527 F.2d 1356, 1365 (5th Cir.), *cert. denied*, 426 U.S. 949, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976).

[14] Contrary to defendant's assertions, an indictment charging in separate counts conspiracy to kidnap and conspiracy to use the United States mail to send a ransom note is not duplicitous. There was no requirement that the Government elect one or the other count since each required different elements of proof from the other to sustain a judgment of conviction. Defendant was acquitted of one count, and no prejudice was shown to have resulted from the indictment charging him in two separate counts. The indictment was neither duplicitous or multiplicitous. *See United States* v. *Free*, 574 F.2d 1221, (5th Cir.), *cert. denied*, 439 U.S. 873, 99 S.Ct. 209, 58 L.Ed.2d 187 (1978); *United States* v. *Hearod*, 499 F.2d 1003, 1005 (5th Cir. 1974); *United States* v. *Goodman*, 285 F.2d 378, 379-380 (5th Cir. 1960), *cert. denied*, 366 U.S. 930, 81 S.Ct. 1651, 6 L.Ed.2d 389 (1961).

[15] The district court's jury charge on the weight to be given character evidence was not erroneous. Unlike the charge in *United States* v. *Leigh,* 513 F.2d 784, 785 (5th Cir. 1975,) it did not contain objectionable language, and it correctly instructed the jury to consider reputation evidence in the same manner it considered all other evidence. *United States* v. *Callahan,* 588 F.2d 1078, 1084-1086 (5th Cir. 1979).

[16, 17] Determinations of admissibility of evidence rest largely within the discretion of the trial court. *United States* v. *Cohen,* 544 F.2d 781, 786 (5th Cir.), *cert. denied,* 431 U.S. 914, 97 S.Ct. 2175, 53 L.Ed.2d 224 (1977); *United States* v. *Linetsky,* 533 F.2d 192, 204 (5th Cir. 1976). The district court's admission of evidence concerning Gorel's unsuccessful investment of $41,000 of Puscedu's money was not reversible error. Puscedu testified that Gorel made a gentlemen's agreement to repay the lost money and that Gorel later suggested the kidnapping plan as a possible way to raise the money. The Government introduced this evidence to show motive. Such evidence is "generally admissible as bearing on the existence and purpose of the conspiracy and the significance of later behavior." *United States* v. *Crockett,* 514 F.2d 64, 72 (5th Cir. 1075).

Defendant charges the tape recordings of conversations involving Puscedu and the coconspirators Puscedu recruited were erroneously admitted into evidence because the tapes were not authenticated and contained numerous deletions and illegible matters. In addition he argues error was committed because Puscedu's conversations were taped without consent and because no proper instructions were given to the jury regarding the tapes.

[18, 19] The tapes disclosed, for the most part, kidnapping instructions given by Puscedu to his recruited coconspirators. Because Puscedu and another coconspirator testified at trial, there was independent evidence of the

same kidnapping plans and arrangements discussed on the tapes. In this Circuit the trial court has broad discretion in determining whether to permit a recording to be played before the jury. *United States* v. *Biggins,* 551 F.2d 64, 66-67 (5th Cir. 1977). If, as in this case, there is independent evidence of the accuracy of the tape recordings admitted at trial, this Court is reluctant to disturb the trial court's decision. *Id.*

[20, 21] The record shows defense counsel was given copies of the complete tapes and corresponding transcripts two weeks in advance of trial. At trial approximately two hours of the twenty hours of recorded conversations were played before the jury. The Federal Rules of Evidence permit admission of summaries of recordings when the original or copies of the originals are made available to the other party. Fed.R.Evid. 1006. See *United States* v. *Clements,* 588 F.2d 1030, 1039 (5th Cir.), *cert. denied,* ..... U.S. ....., 99 S.Ct. 1214, 59 L.Ed.2d 455 (1979); *United States* v. *Smyth,* 556 F.2d 1179, 1184 (5th Cir.), *cert. denied,* 434 U.S. 862, 98 S.Ct. 190, 54 L.Ed.2d 135 (1977). Copies of transcripts of the tapes were given to the jurors to follow while the tapes were played, without objection by defendant. Defendant also failed to point out specific items in the tapes which were inaccurate. The trial court's decision to permit use of transcripts were not erroneous. See *United States* v. *Onori,* 535 F.2d 938, 948-949 (5th Cir. 1976).

[22] Extensive testimony was presented by FBI agents who wired the coconspirators with the recording devices. The agents testified to their training and experience in the use of recording devices, the type of equipment used in this case, the procedures used to wire the coconspirators, the chain of custody of the tapes, the transcription of the tapes and other retails concerning the preparation of the tapes. The record reveals the tapes were properly authenticated. See *United States* v. *Clements, supra; United States* v. *Denton,* 556 F.2d 811, 815-816 (6th Cir.), *cert. denied,* 434 U.S. 892, 98 S.Ct. 269, 54 L.Ed.2d 178 (1977).

[23] In this case the coconspirators voluntarily consented to the Government's recording of their conversations with Puscedu. Where one party consents to such recordings, there is no violation of the Fourth Amendment. See *United States* v. *White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Hoffa* v. *United States,* 385 U.S. 293, S.Ct. 408, 17 L.Ed.2d 374 (1966); *Hudson* v. *United States,* 429 F.2d 1311, 1312 (5th Cir. 1970), *cert. denied,* 402 U.S. 965, 91 S.Ct. 1632, 29 L.Ed.2d 130 (1971).

Finally, defendant raised no objection to the trial court's instructions to the jury. Since no plain error has been demonstrated, his attack on the failure of the trial court to give limiting instructions regarding the tapes must fail. Fed.R.Crim.P. 30, 52(b); *United States* v. *Pena, supra.*

At oral argument defendant conceded that *United States* v. *James,* 590 F.2d 575, 583 (5th Cir. 1979) (en banc), has prospective application only and therefore is not applicable to this case. Defendant also conceded he was not eligible for a probated sentence since the crime for which he was convicted is punishable by life imprisonment. 18 U.S.C.A. § 3651.

[24, 25] The district court's denial of defendant's motion for judgment of acquittal or in the alternative for a new trial was not erroneous. In passing on such motions, the reviewing court must view the evidence in the light most favorable to the Government and the jury verdict is entitled to the benefit of all reasonable inferences that might be drawn therefrom. *United States* v. *Soto,* 591 F.2d 1091, 1101 (5th Cir.), *cert. denied,* ..... U.S. ....., 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979); *United States* v. *Downen,* 496 F.2d 314, 318 (10th Cir.), *cert. denied,* 419 U.S. 897, 95 S.Ct. 177, 42 L.Ed.2d 142 (1974). This record demonstrates there was a sufficient quantum and quality of evidence that the jury could have reasonably found defendant guilty of conspiracy to kidnap.

AFFIRMED.

APPENDIX B

UNITED STATES v. GOREL

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EARL J. GOREL,
Defendant-Appellant.

No. 78-5592

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Jan. 11, 1980

Appeal from the United States District Court for the Southern District of Texas; John V. Singleton, Jr., Chief Judge.

ON PETITION FOR REHEARING

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

On petition for rehearing, defendant Gorel points out he exercised all ten of his peremptory jury challenges, not six as stated in the opinion. Of the ten challenges, six were used to strike persons who had read or seen reporting about the kidnapping attempt. The sentence "Indicative of the absence of juror prejudice is the fact that of defendant's ten peremptory challenges, only six were used to strike potential jurors from the case" is therefore deleted from the opinion in this case, which will be published as thus corrected.

Defendant indicates the typical response of a prospective juror when asked about the case was

> Well, I just — as I read it, I thought some injustice going to be done to Mr. Schnitzer [referring either to the actual alleged kidnapping victim or his father]. That was my opinion.

In *Murphy* v. *Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), *quoting Irvin* v. *Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the Supreme Court instructed

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 723, 81 S.Ct. at 1642.

That potential jurors were aware of the kidnapping attempt from media reporting does not indicate, on this record, the defendant was prejudiced automatically. Gorel has not shown that knowledge by potential jurors of the kidnapping attempt from media coverage precluded potential jurors from making impartial decisions in connection with the evidence presented at trial.

The petition for rehearing is DENIED.